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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,908	09/11/2003	Barbara Ann Kuhns	CWELC.00013	4195

22858 7590 11/29/2005

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EXAMINER	
KUHNS, SARAH LOUISE	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 11/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/659,908	KUHNS ET AL.	
	Examiner	Art Unit	
	Sarah L. Kuhns	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10/17/05*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-21* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-21* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-13 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. There is insufficient support in the specification for the newly added limitation, "containing substantially no calcium."

Claim Rejections - 35 USC § 102

Claims 1, 6-8, 13-15 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Olliver, U.S. Patent 2,910,365.

In regard to claims 1, 6, 7, 14 and 15, Olliver discloses a method comprising the steps of hydrating low-methoxyl pectin in an aqueous solution containing substantially no calcium; heating a liquid fraction to at least 140°F (milk is inherently pasteurized at

such a temperature); mixing the aqueous pectin solution with the liquid fraction wherein the liquid fraction comprises soluble calcium in the amount claimed (8 ounces of milk contains between 290 and 300 mg of calcium); and adding a fruit component, which can be a fruit concentrate or a fruit puree, to the mixture wherein the fruit component is maintained a temperature below which cooking of the fruit component will occur (see Examples 1-6).

In regard to claim 8, as the process of Olliver meets the claimed method steps, it would be inherent that the mixture of Olliver would also attain a homogenous or grainy appearance as claimed.

In regard to claims 13 and 19, Olliver discloses a food sauce comprising low-methoxyl pectin, calcium and fruit (see Examples 1-6). "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit evidence that the claimed process produces a product that is different from that of the prior art.

Claims 13, 14, 15 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Waitman, U.S. Patent 3,367,784.

In regard to claims 13 and 19, Waitman discloses a food sauce comprising low-methoxyl pectin, calcium and fruit (see Example 1). "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit evidence that the claimed process produces a product that is different from that of the prior art.

In regard to claims 14 and 15, Waitman discloses a method comprising the steps of hydrating low-methoxyl pectin in an aqueous solution containing substantially no calcium; heating a liquid fraction to at least 140°F; mixing the aqueous pectin solution with the liquid fraction wherein the liquid fraction comprises soluble calcium with approximately 125 mg of calcium per gram of pectin; and adding a fruit component to the mixture (see Example 1). Waitman discloses adding the mixture to the fruit component at a temperature of 190°F and it is not clear that substantial cooking of the fruit would occur at this temperature.

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Gordon, U.S. Patent 2,629,665. Gordon discloses a food sauce comprising low-methoxyl pectin, calcium and fruit (column 3, line 55 - column 4, line 25). "Even though product-by-process claims are limited by and defined by the process, determination of

patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit evidence that the claimed process produces a product that is different from that of the prior art.

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Baker, U.S. Patent 2,605,188. Baker discloses a food sauce comprising low-methoxyl pectin, calcium and fruit (column 2, lines 4-9 and column 3, lines 32-42). "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit evidence that the claimed process produces a product that is different from that of the prior art.

Claim Rejections - 35 USC § 103

Claim 1, 14 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Waitman in view of Gordon and Olliver.

Waitman discloses a method comprising the steps of hydrating low-methoxyl pectin in an aqueous solution containing substantially no calcium; heating a liquid fraction to at least 140°F; mixing the aqueous pectin solution with the liquid fraction wherein the liquid fraction comprises soluble calcium with approximately 125 mg of calcium per gram of pectin; and adding a fruit component to the mixture (see Example 1).

Waitman does not disclose the liquid fraction comprising 20-100 mg of calcium. However, Gordon discloses that in making a low methoxyl pectin, calcium and fruit product the amount of calcium ion added should be at least 25 mg per gram of pectin, but that calcium ion concentration in excess of this amount has no deleterious effect except that the flavor is slightly impaired. Therefore, it would have been obvious to use a smaller amount of calcium ion in the method of Waitman in order to avoid impairing the flavor of the final product.

Waitman does not disclose maintaining the fruit component in the mixture at a temperature below which cooling of the fruit component will occur. However, Olliver discloses low methoxyl pectin, calcium and fruit products comprising uncooked fruit (see Examples 1-6). As such, it would have been an obvious matter of choice to add fresh fruit and refrain from cooking it during the method of Waitman, as some consumers prefer fresh fruit to cooked fruit.

Claims 2 and 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, as applied above, in further view of Ross, U.S. Patent 3,185,576. Olliver does

not disclose maintaining the aqueous pectin solution at a temperature of 140°F - 170°F or the addition of a thickener. Ross discloses a process comprising hydrating low methoxyl pectin in an aqueous solution, adding a thickener, and heating the mixture to 170°F prior to addition of a liquid fraction containing soluble calcium to obtain a stabilized jelly-like product (see Example). It therefore would have been obvious also add a thickener and heat the aqueous pectin solution of Olliver in order to ensure complete hydration of the low methoxyl pectin and obtain a product with the desired consistency.

Claims 4-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver in view of Ross, as applied above, in further view of Daravingas, U.S. Patent 6,235,320. Olliver in view of Ross discloses all the features pf the instantly claimed invention except for the use of xanthan as a thickener. Daravingas teaches a yogurt composition containing xanthan gum (column 7, lines 8-18), in an amount ranging from 0.2% to 2% by weight. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used xanthan gum as taught by Daravingas in the product of Olliver in order to get a final product with a good viscosity and consistency, and since as taught by Daravingas, xanthan gum is readily commercially available and its use is well established in the art (column 7, lines 8-25).

Claims 9-11, 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver in view of Ross, as applied above, in further view of Baker and

Waitman. Olliver does not disclose the addition of frozen fruit. Baker, however, discloses a process in which low methoxyl pectin is mixed with partially frozen fruit concentrate and a calcium ion solution (column 2, lines 4-9; column 3, lines 3-9; and column 3, lines 32-42). Waitman relates to a similar method (discussed above) and teaches that the gel compositions may be refrigerated prior to serving in order to obtain a firmer gel (column 5, line 73 - column 6, line 3). As such it would have been an obvious alternative to add frozen fruit in the method of Olliver, as taught by Baker, which would provide the added benefit of chilling the gel faster, thereby allowing for a firmer gel, as taught by Waitman.

Claims 12 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, as applied above. Olliver does not expressly disclose the rate at which the liquid fraction is added to the aqueous pectin solution. However, it would have been obvious to one of ordinary skill in the art at the time of the invention to have mixed the ingredients together at a rate commensurate with the volume and viscosity of the product, as well as within the range of the equipment available in order to have all the ingredients properly mixed and incorporated with each other, and it would have not involved an inventive step for one of ordinary skill to utilize a rate within the range as instantly claimed.

Claims 13 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ross. Ross discloses a food sauce comprising low-methoxyl pectin, calcium and

sodium alginate, which is a thickener (see example 1). Although Ross does not explicitly disclose fruit, it does disclose natural flavorings generally (column 1, lines 23-26), which would be expected to include fruit "Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Applicant is invited to submit evidence that the claimed process produces a product that is different from that of the prior art.

Response to Arguments

Applicant's arguments with respect to claims 1-19 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sarah L. Kuhns whose telephone number is 571-272-1088. The examiner can normally be reached on Monday - Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on at 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SLK

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